IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ALLEN GERBER, ET AL.	:	CIVIL ACTION
	:	NO. 02-241
Plaintiffs,	:	
	:	
v.	:	
	:	
EDWARD SWEENEY, ET AL.,	:	
	:	
Defendants.	:	

ORDER-MEMORANDUM

AND NOW, this ___ day of **March, 2003**, upon review of defendants' motions to dismiss (doc. nos. 35-1 & 42-1), defendants' motions for summary judgment (doc. nos. 35-2 & 42-2), and plaintiffs' responses thereto, it is hereby **ORDERED** that defendant Ethier's motion to dismiss (doc. no. 35-1) and the Lehigh County defendants' motion to dismiss (doc. no. 42-1) are **GRANTED in part** and **DENIED in part**, and that defendant Ethier's motion for summary judgment (doc. no. 35-2) and the Lehigh County defendants' motion for summary judgment (doc. no. 42-2) are **DENIED without prejudice**. The reasons for the decisions are as follows:

Richard Allen Gerber ("Gerber") was and Charles Shumanis III ("Shumanis") (collectively referred to as "plaintiffs") is a sentenced prisoner in the Lehigh County Prison ("LCP"), in Allentown, Pennsylvania. Plaintiffs allege that the actions and/or inaction of the defendants caused plaintiffs to be

subjected to certain conditions of confinement which violate the Eighth Amendment to the United States Constitution. They bring this action pursuant to 28 U.S.C. § 1983.

Richard Ethier ("Ethier") is the Food Services Director for Canteen Correctional Food Service, a/k/a Compass Group USA, Inc. ("Canteen"), a private corporation that contracted with LCP to provide food services to inmates. Plaintiffs allege that while they were confined in disciplinary segregation, defendant Ethier, acting on behalf of Canteen and LCP, served them foods that differed from those food items that were provided to the general prison population. Specifically, plaintiffs allege that the general prison population was served milk and fruit juices, but that while in segregation, these items were substituted with various solid foods, and that water was the only beverage provided to inmates in segregation. Plaintiff Gerber further alleges that he had been prescribed a special diet by prison medical officials. Finally, plaintiffs allege that Ethier was aware of their requests that they be served the same food products, while in segregation, as the general prison population, and that Ethier never responded to these requests.

To state a claim under section 1983, "a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state

law." West v. Atkins, 487 U.S. 42, 48 (1988). The plaintiff must also allege that the deprivation occurred as a result of the defendant's deliberate indifference to the plaintiff's rights. Wilson v. Seiter, 501 U.S. 294, 303-04 (1986).

Ethier, while not a state employee, does not appear to contest plaintiffs' assertion that he acted under color of state law. Moreover, upon review of the employment arrangement between Ethier's employer and the prison authorities, the court finds that there exists a sufficiently close nexus between the state, via LCP, and the challenged action, such that the private behavior of defendant Ethier is "fairly attributable to the state" itself. West v. Atkins, 487 U.S. 42, 49-51 (1988); see Groman v. Toenship of Manalapan, 47 F.3d 628, 638-39 (1995); see also Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc., 531 U.S. 288, 295-96 (2001) (a challenged activity or action by a private actor constitutes "state action" when "a private actor operates as a willful participant in joint activity with the [s]tate or its agents," when the private actor "is controlled by an agency of the [s]tate" or "delegated a public function by the [s]tate," or when the state is "entwined in [the private party's] management or control"). Ethier himself admits that his actions as Food Services Director for Canteen were completely controlled by LCP. Accordingly, Ethier's provision of food to inmates at LCP constitutes an action under color of state law for the

purposes of section 1983.

On the other hand, Ethier argues that under the facts of this case, as asserted by the plaintiffs, the plaintiffs were not deprived of any right secured by the laws of the United States. Ethier also contends that even if the rights of the plaintiffs were violated, plaintiffs cannot demonstrate that Ethier acted with deliberate indifference.

(1) Plaintiffs v. Ethier

a) Nutritionally inadequate diet claim

Although inmates do not have a constitutional right to be served any particular type of food, Burgin v. Nix, 899 F.2d 733, 734-35 (8th Cir. 1990), the Eighth Amendment prohibition against cruel and unusual punishment requires that inmates be served "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it." Ramos v. Lamm, 639 F.2d 559, 571 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981), cited in, Peterkin v. Jeffes, 661 F. Supp. 895, 922 (E.D. Pa. 1987), vacated in part on other grounds in, Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988); see Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983). In this case, plaintiffs do not assert that their meals were prepared or served in a manner which jeopardized their health. Thus, the issue before the court is whether the meals provided to the plaintiffs, while they were in

segregation, were nutritionally adequate.

Ethier relies heavily on this court's decision in Williams v. Lehigh Dep't of Corrections, 79 F. Supp. 2d 514 (E.D. Pa. 1999), in which the court granted defendant's motion for summary judgment on issues substantially similar to those present here. With regards to plaintiff Shumanis, Williams, is practically indistinguishable from the case at bar. See Williams, 79 F. Supp. 2d at 518. The allegations in the complaint, as they pertain to Shumanis, are essentially identical to the allegations made in Williams. See id. Like Williams, Shumanis has failed to allege any facts that could establish that the meals provided to him were nutritionally inadequate. Accordingly, Shumanis's claims against Ethier will be dismissed with prejudice.

With regards to plaintiff Gerber, however, Williams is readily distinguishable from the matter presently before the court. Unlike Williams, Gerber has alleged that he is subject to a medically prescribed special diet. In considering Ethier's motion to dismiss, the court must accept as true all factual allegations made in the complaint and all reasonable inferences that can be drawn therefrom. Ranson v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). The motion should be granted only if "no relief could be granted under any set of facts which could be proved." Id. Accepting as true Gerber's allegation that he is

subject to a special diet, through proper discovery, Gerber could obtain credible evidence sufficient to prove that, in light of his medically prescribed diet, Ethier's and LCP's substitution of certain solid foods for fruit juices and milk resulted in Gerber being subjected to a diet that was not nutritionally adequate for him. Under these circumstances, Gerber would be able to establish that his right, under the Eighth Amendment, to be served a nutritionally adequate diet while incarcerated was violated by Ethier and LCP.

As stated above, Ethier also contends that plaintiffs have failed to state a claim under section 1983 because they did not allege sufficient facts to establish that Ethier acted with deliberate indifference. To prove deliberate indifference, plaintiff must establish that defendant knew that plaintiff faced a "substantial risk of serious harm," but disregarded "that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994); see Singletary v. Pa. Dep't of Corrections, 266 F.3d 186, 193 n.2 (3d Cir. 2001) (stating that the general standard for a § 1983 deliberate indifference claim is set forth in Farmer). In their complaint, the plaintiffs specifically allege that they raised their concerns to defendant Ethier, and that Ethier never responded. Accepting these allegations as true, it is reasonable to infer that Ethier knew that not providing Gerber with a diet in accordance with that

which had been medically prescribed to him could result in a substantial risk of serious harm to Gerber's health and that by continuing to fail to provide Gerber with a nutritionally adequate diet, Ethier unreasonably disregarded that risk. Accordingly, the court finds that Gerber has successfully alleged deliberate indifference on the part of Ethier.

b) Other claims

It should be noted, however, that the plaintiffs did not allege knowledge on the part of defendant Ethier with regards to the other claims in their complaint. Therefore, the court finds that plaintiffs have, indeed, failed to state a section 1983 claim against Ethier with regards to any other claim.

c) Legal defenses

Finally, Ethier argues that he cannot be sued in his official capacity because, in that capacity, he is not a "person" for the purposes of liability under section 1983, and that under the doctrine of qualified immunity, he cannot be sued in his individual capacity. With regards to claims brought against Ethier in his official capacity, it is well established that state officials sued in their official capacities are not subject to damages liability under section 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); 42 U.S.C. § 1983. Accordingly, the court finds that Ethier cannot be liable for damages to the extent he is sued in his official capacity.

As previously stated, Ethier has also raised the defense of qualified immunity. First of all, the court notes that, under the present state of the law, serious doubts exist as to whether Ethier, a private actor, may even assert the defense of qualified immunity. See Richardson v. McKight, 521 U.S. 399, 403-13 (1997) (holding that private prison guards do not enjoy immunity from suit under the doctrine of qualified immunity); Wolfe v. Horn, 130 F. Supp. 2d 648, 656 (E.D. Pa. 2001) ("[u]nder the current state of the law, private individuals who contract with the state to provide prison services do not appear entitled to qualified immunity"). Assuming arguendo that the defense of qualified immunity is available to Ethier, the court finds that, under the given facts, Ethier is, nonetheless, not entitled to qualified immunity.

State officials performing their discretionary functions are shielded from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed 2d 818 (1999). The first question is to determine whether Ethier's conduct constituted a violation of a constitutional right. See Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed 2d 272 (2001). In doing so, the court must "arrange the facts in the light most favorable to the plaintiff, and then determine

whether, given precedent, those 'facts,' if true, would constitute deprivation of a right." Wilson v. Russo, 212 F.3d 781, 786 (3d Cir. 2000).

The second step in conducting the qualified immunity analysis is to determine whether the constitutional right was clearly established, or, in other words, "whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The issue becomes, given the established law and the information available to the defendant, whether a reasonable official in the defendant's position could have believed that his conduct was lawful. See Doe v. Delie, 257 F.3d 309, 318 (3d Cir. 2001).

For the reasons set forth in the above analysis, accepting Gerber's allegations as true and drawing all reasonable inferences in his favor, Ethier's failure to provide Gerber with a diet that conforms with that which he had been medically prescribed constitutes a violation of Gerber's constitutional right to be provided a nutritionally adequate diet while incarcerated. Furthermore, an inmate's right to a nutritionally adequate diet, as provided under the Eighth Amendment's

prohibition against cruel and unusual punishment, was clearly established at the time of the alleged constitutional violation. Gerber's confinement at LCP commenced in November of 2001, over twenty years after the Tenth Circuit announced the "nutritionally adequate" standard in Ramos. Ramos, 639 F.2d at 571. Since then, and ranging from two to fifteen years before Gerber's incarceration at LCP, a number of courts in this district have recognized and enforced the standard enunciated in Ramos. See Williams, 79 F. Supp. 2d at 518; Justice v. Zimmerman, 1990 WL 20196, *8 (E.D. Pa. Feb. 28, 1990); Hassine v. Jeffes, 1989 WL 104801, *5 (E.D. Pa. Sept. 7, 1989); Peterkin, 661 F. Supp. at 922; Outterbridge v. Owens, 1986 WL 12019, *1 (E.D. Pa. Oct. 22 1986). Additionally, although not dispositive, Ethier himself concedes the he knew that inmates have a right to a nutritionally adequate diet. Accordingly, accepting as true Gerber's allegations that he was subject to a medically prescribed diet, that Ethier knew of his dietary needs and that the meals Ethier provided to Gerber did not satisfy his medically prescribed dietary needs, the court finds that it would be clear to a reasonable prison food services director that this conduct is unlawful and that a reasonable person in defendant's position could not have believed this conduct to be lawful. Therefore, the court finds that Ethier is not entitled to the defense of qualified immunity, even if the defense is available.

For the foregoing reasons, Ethier's motion to dismiss is denied to the extent that it seeks to dismiss Gerber's claim that he was served a nutritionally inadequate diet while in segregation. Ethier's motion is granted, however, with regards to all other claims in plaintiffs' complaint. Accordingly, all claims against Ethier, except Gerber's nutritionally inadequate diet claim, are dismissed.

(2) Plaintiffs v. Lehigh County Defendants

a) Nutritionally inadequate diet claims

Plaintiffs also assert a number of claims, including those discussed above, against a number of other individuals collectively referred to as Lehigh County defendants.[1] With regards to plaintiffs' nutritionally inadequate diet claims, the analysis employed above is equally applicable here. Accordingly, plaintiff Shumanis's claim against the Lehigh County defendants for a nutritionally inadequate diet is dismissed, but plaintiff Gerber's is not. Plaintiffs' remaining claims are addressed below.

b) Other conditions of confinement

A number of plaintiffs' remaining claims against the Lehigh County defendants may be examined together. First, in

[1] Edward Sweeney, Dale Meisel, James Bloom, Nancy Afflerbach, Cynthia Ebizio, Nicole Rasely, Sgt. Brian Dugan, Sgt. Scott Dergham, Sgt. Tom Koch, C.O. Chris Begel and C.O. Dave Minda are referred to collectively as the Lehigh County defendants.

paragraph one of their complaint, plaintiffs claim that a number of the Lehigh County defendants violated their constitutional rights by denying them Saturday mail delivery throughout their incarceration. Second, in paragraph two of the complaint, plaintiffs allege that the Lehigh County defendants violated their rights by denying them a newspaper subscription while in segregation. Third, plaintiffs contend, in paragraph six of their complaint, that their cells were not cleaned for approximately eight weeks. Fourth, in paragraph seven, plaintiffs allege that during the same time period, they were offered laundry services only five times, they were provided with clean linens only twice and they were not provided clean blankets. Fifth, in paragraph eight, plaintiffs allege that they were prohibited from possessing certain personal items while in segregation.

"The primary responsibility for operating prisons belongs to prison administrators, to other state law enforcement officials and to the state legislature," and does not belong to the courts. Peterkin v. Jeffes, 855 F.2d 1021, 1032 (3d Cir. 1988). Furthermore, prison authorities are given substantial deference with regards to the adoption and implementation of prison regulations and policies. See Washington v. Harper, 494 U.S. 210, 223 (1990) (holding that prison regulations and policies are valid so long as they are "reasonably related to

legitimate penological interests"). Accordingly, only a significant deprivation of an inmates rights will rise to the level of "cruel and unusual punishment" under the Eighth Amendment. See Peterkin, 855 F.2d at 1023-25 (stating that Eighth Amendment judgments should not be merely the subjective views of judges, and that prison conditions violate the Eighth Amendment only when they "deprive inmates of the minimal civilized measure of life's necessities"). Although this standard is an amorphous one and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Rhodes v. Chapman, 452 U.S. 337, 346 (1981), by canvassing the cases where courts have not found the allegation to rise to the level of an Eighth Amendment violation, it is clear that the allegations made by plaintiffs with regards to the above claims are not sufficiently serious to constitute cruel and unusual punishment. See, e.g., Williams, 79 F. Supp. 2d at 518-19 (no Eighth Amendment violation where prisoner was restricted to limited showers and shaves, and subject to temporary restrictions on reading materials); Young v. Berks County Prison, 940 F. Supp. 121, 123-24 (E.D. Pa. 1996) (no Eighth Amendment violation where inmate was often forced to wear ill-fitting, dirty or torn cloths because these conditions were not sufficiently serious enough to constitute cruel and unusual punishment); Odom v. Tripp, 757 F. Supp. 1491, 1493 (D.C. Mo.

1983) (prisons denial of Saturday mail delivery to inmates does not constitute cruel and unusual punishment). Accordingly, plaintiffs having failed to allege a deprivation of their rights sufficiently serious to constitute an Eighth Amendment violation with regards to the claims contained in paragraphs one, two, six, seven and eight, these claims are dismissed.

c) Grievance and property receipt system

In paragraph three of their complaint, plaintiffs challenge the adequacy of the LCP grievance system and property receipt system. In paragraph ten of their complaint plaintiffs challenge the system by which inmates in segregation are administratively reviewed. Nowhere in the complaint, however, do plaintiffs allege harm of any kind, including constitutional injury. There can be no section 1983 liability, however, where there is no violation of the plaintiff's constitutional rights. See Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst., --- F.3d ---, 2003 WL 148919, at *8 (3d Cir. Jan. 22, 2003). Accordingly, the plaintiffs having failed to allege the violation of a constitutional right therein, plaintiffs' claims, as set forth in paragraphs three and ten of the complaint are dismissed without prejudice.

d) Access to court

In paragraph twelve of the complaint, plaintiffs allege that they have been denied access to the facility law library and

that the only means by which they could obtain the necessary materials to conduct legal research was to submit request slips. This precise issue was recently addressed by this court in Williams v. Lehigh Dep't of Corrections, 79 F. Supp. 2d 514 (E.D. Pa. 1999). In Williams, the court noted that this claim does not constitute an Eighth Amendment claim, but rather a First Amendment access to court claim, and that, in this context, prisoners have "no free-standing rights to a law library or legal assistance" and that, "libraries and other assistance are simply the means by which prisoners gain the right to access the court." Id. at 518 (quoting Reynolds v. Wagner, 128 F.3d 166, 183 (3d Cir. 1997)). The court further noted that to bring a viable claim for denial of access to court, an inmate must show "direct injury." Id.; see Reynolds, 128 F.3d at 183. In this case, as in Williams, plaintiffs do not allege that they were "unable to raise a claim [they] wished to raise or that [their] efforts in any pending action were prejudiced because of [their] inability to acquire needed materials." Williams, 79 F. Supp. 2d at 518. To the contrary, as in Williams, the plaintiffs acknowledge that they were able to receive the necessary legal materials from the facility library via request slips. Therefore, plaintiffs have failed to state a claim for denial of their right to access the court. Accordingly, this claim is dismissed.

e) Opportunity for recreation and exercise

In paragraph four of their complaint, plaintiffs allege that, while in segregation, they were afforded only outside recreational opportunities, but were not provided adequate outdoor apparel. As noted by the Third Circuit in Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988) and conceded by defendants, meaningful recreation "is extremely important to the psychological and physical well-being of inmates." Id. at 1031. The Third Circuit has held that inmates have a constitutional right to regular exercise. Id. Moreover, although inmates are generally not entitled to be provided with any particular type of clothing, they are entitled to suitable clothing for exercise under the circumstances. See Williams, 79 F. Supp. 2d at 518. When inmates are restricted to only outside recreation and not given appropriate clothing, they must choose between losing their recreational privileges or having to go outside with improper clothing. See id. Either choice could result in serious detrimental effects to the inmate's physical and psychological well-being. It necessarily follows that plaintiffs must be afforded indoor recreation during inclement weather or be provided with appropriate clothing for outdoor recreation. Plaintiffs allege that they were given neither. Thus, plaintiffs essentially allege that they were constructively denied their right to regular recreation and exercise. Plaintiff's further allege that defendant Sweeney was made aware of their condition.

Accordingly, the court finds that the plaintiffs have adequately alleged that defendant Sweeney acted with deliberate indifference to their health and safety, and therefore, violated their Eighth Amendment rights. See Wilson v. Seiter, 501 U.S. 294, 303-04 (1991) (stating the elements of a section 1983 claim under the Eighth Amendment); see also Ranson, 848 F.2d at 401 (stating plaintiff's burden on a motion to dismiss). Therefore, the Lehigh County defendants' motion to dismiss is denied to the extent it seeks to dismiss the claims alleged by plaintiffs in paragraph four of their complaint.

f) Haircuts and personal hygiene

In paragraph five of plaintiffs' complaint, plaintiffs allege that the individuals at LCP who are in charge of providing haircuts and certain personal hygiene products to the inmates are not qualified to do so and that, as a result, the grooming utensils used on and provided to inmates are not properly cleaned and sterilized, which places inmates at risk of contracting diseases. Plaintiffs further allege that a number of the defendants were made aware of these alleged practices, but did nothing to correct the practice. The defendants do not specifically address these allegations in their motion to dismiss. Accepting plaintiffs' factual allegations as true, the court finds that plaintiffs have alleged sufficient facts which, if proven, would support a finding that the Lehigh County

defendants acted with deliberate indifference to their health and safety by supplying plaintiffs with grooming utensils that placed them at risk of disease. See Wilson, 501 U.S. at 303-04; Ranson, 848 F.2d at 401. Therefore, the Lehigh County defendants' motion to dismiss is denied to the extent it seeks to dismiss these claims.

g) Blood pressure monitoring

Finally, in paragraph eleven of the complaint, plaintiff Gerber alleges that he requires daily monitoring of his blood pressure and that no such monitoring was provided while he was in segregation. Under the standards enunciated above, the court finds that Gerber has, indeed, stated a claim for deliberate indifference to his serious medical needs with regards to the allegations made in paragraph eleven of the complaint. Accordingly, defendants' motion to dismiss this claim is denied.

3) Conclusion

In sum, all claims are dismissed against Ethier and the Lehigh County defendants except: 1) plaintiff Gerber's claim that he was subjected to a nutritionally inadequate diet while in segregation; 2) plaintiff Gerber's claim that he was denied adequate medical treatment and monitoring while in segregation; 3) plaintiffs' claim that they were denied their right to regular recreation and exercise; and 4) plaintiffs' claim that, as a result of LCP's improper cleaning and sterilization of grooming

utensils, plaintiffs are placed at risk of contracting diseases.

The court notes that, according to the plaintiffs, only plaintiff Shumanis is currently incarcerated at LCP, and therefore, only he has standing to seek injunctive relief. The court further notes that defendants Carol Summers, George Weiser, Wexford Health Services and Peter Seagraves have not submitted a motion to dismiss, nor have they joined in the motions submitted by the other defendants. Accordingly, all claims against these defendants remain pending.

Finally, the court finds that with regards to the defendants' motions for summary judgement, because the parties have not taken discovery, there is insufficient evidence on the record to enable the court to determine whether or not a genuine issue of material fact exists as to plaintiffs' remaining claims at this stage of the litigation. Therefore, the court finds that summary judgment at this time would be premature.

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO, J.